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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 175

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

PETITIONER,

v.

STATE MARINE LINES, INC., a corporation,

RESPONDENT,

v.

GULF FLORIDA TERMINAL COMPANY, a corporation,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION AND BRIEF ON BEHALF OF AMERICAN TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

AMERICAN TRIAL LAWYERS ASSOCIATION
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A

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RESPONDENT,

v.

GULF FLORIDA TERMINAL COMPANY, a corporation,
RESPONDENT.

MOTION AND STATEMENT OF INTEREST OF THE AMERICAN TRIAL LAWYERS ASSOCIATION FOR LEAVE TO INTERVENE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

TO THE HONORABLE JUDGES OF THE COURT:

The American Trial Lawyers Association moves this Honorable Court for leave to file the attached brief in support of the position of the Petitioner.

Consent has been sought from counsel for all parties.

Counsel for the petitioner has given his assent. Counsel for the defendant respondent and counsel for the third-party respondent do not assent, but also do not oppose the filing of this amicus curiae brief.

The American Trial Lawyers Association is a national bar association whose membership exceeds 25,000 lawyers who are primarily engaged in the practice of law on behalf of plaintiffs in personal injury litigation. The admiralty section of this association includes most of the attorneys who specialize in the maritime personal injury law. These attorneys represent seamen, longshoremen and other maritime workers who are engaged in a hazardous industry, and, as such, are recognized as having a special status by virtue of legislation and decisions of the courts.

This Association and the people it represents are directly affected by the scope and application of state death statutes, and the effort to create a uniformity of remedy, as applied to cases involving the death of maritime workers on waters within the territorial jurisdiction of the various states. More specifically, this Association is vitally concerned with this appeal, not only for the instant case, but also for the effect this result will have on similar cases now existing within the State of Florida, or in other maritime states.

As a resolution of the issues in this case will materially affect the outcome of many others, it takes on a position of major importance to thousands of maritime workers, the maritime industry and the admiralty bar.

For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief of Amicus Curiae.

AMERICAN TRIAL LAWYERS ASSOCIATION
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RESPONDENT.

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

Questions Presented

A. Whether or not a State Wrongful Death Act which does not include the ancient maritime doctrine of unseaworthiness is contrary to Maritime and Admiralty Law.

B. Whether or not the decision in *The Tungus* v. *Skovgaard* has survived.

C. How did the present complicated status of the law begin and where will it end?

A. A State Wrongful Death Act Which Does Not Include the Ancient Maritime Doctrine of Unseaworthiness is Contrary to Maritime and Admiralty Law.

Admiralty and maritime jurisdiction is part of the judicial power conferred upon the United States by the Constitution, which provides that:

"The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." The jurisdiction is exclusively federal. The purpose of the grant of federal power is to make and keep the maritime law essentially uniform and harmonious throughout the international and interstate relations of the nation. *Benedict on Admiralty,* Sixth Edition p. 1.

Although injured seamen had rights to maintenance, care and continued wages until the end of the voyage on prior lawful discharge regardless of fault or negligence, the state workmen's compensation legislation was also progressing in an effort to provide a sensible system of maintaining employees who sustained injuries during the course of their employment. It was inevitable that a conflict would arise between the maritime law and a state workmen's compensation statute which occurred in the case of *Southern Pacific Company* v. *Jenson,* 244 U.S. 205, 61 L.ed. 1086, 37 Sup.Ct.Rep. 524, (1917), and which held that state legislation may not introduce disharmonious elements which affect the uniformity of maritime law.

Subsequently, every time that Congress endeavored to delegate the domain of maritime law and jurisdiction to the states legislative power, it was struck down on the

basis that only the Federal Government by virtue of the Constitution had the authority in these matters in order to establish and maintain uniformity in maritime matters. It is understandable that in order to avoid as many rules of law as there are states, that the framers of the Constitution gave only to Congress the control of maritime matters to insure uniformity of dispensation.

This admirable design to maintain harmony upon all who are subject to the jurisdiction of the Admiralty, is it now successful?

The holding in the leading case of *The Osceola*, 189 U.S. 158, 175, 231 S.Ct. 483, 487, 47 L.ed. 760, clearly sets forth the admiralty rule that the vessel and owner are liable to the seaman for "injury caused by unseaworthiness of the vessel or its appurtenances, appliances and equipment."

Thereafter in an effort to enlarge the rights of seamen and provide a recovery based upon negligence, the Jones Act was enacted which pre-empted those separate state remedies based upon negligence and created uniformity of remedy for injuries or death based upon negligence. Of course, this new right did not exclude the traditional right of recovery for seamen based upon unseaworthiness. *Mahnich* v. *Southern S.S. Co.* 321 U.S. 96, 99, 64 S. Ct. 455, 457, 88 L.ed. 561.

The Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. Sec. 761-768 (1958 ed) was enacted to provide an admiralty remedy for wrongful death of a seaman or other person occurring on the high seas beyond a marine league from the shore of any state. By judicial interpretation the Act includes unseaworthiness as a basis of responsibility. *Chermesino* v. *Vessel Judith Lee Rose, Inc.*, (D.C. Mass. 1961) 211 F. Supp. 36, Aff'd (1st Cir.) 317 F.2d 927, Cert. den. (1963) 375 U.S. 931.

This body of law continued to develop on a harmonious basis with the theme of uniformity intertwined throughout

with the decision in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85; 66 S. Ct. 872; 90 L.ed. 1099, wherein it was held that stevedores or longshoremen injured aboard a ship are within the traditional protection afforded to seamen by admiralty and that "the fortuitous circumstance" of their employment by one other than the owner did not relieve the shipowner from responsibility, since the worker was doing a seaman's work and incurring a seaman's hazards.

The next logical step would be the development of a uniform maritime right for the death of a person not a seaman killed within a marine league from the nearest state. The decision in the case of *The Tungus* v. *Skovgaard* 358 U.S. 588; 79 S. Ct. 503; 3 L.ed 2d 524 which was, incidentally, a 5-4 decision and was a complete deviation from the concept of uniformity of maritime law so tenaciously adhered to in prior decisions. The probability is that the majority decision was enunciated because it was not conceivable that the ancient and deep-rooted concept of unseaworthiness could or would be ignored by any state, but unfortunately the unbelievable has occurred.

Although it was not anticipated the *Tungus* decision has provided the vehicle in which certain states applying their own state wrongful death statutes have deleted from the maritime worker a basic right to the extent that a maritime worker killed in one jurisdiction may have his rights prejudiced merely because of the fortuitous circumstances of the place of the happening of the accident. This is as discriminatory a situation as the mind can conjure, and in direct conflict with the underlying principle of maritime uniformity.

The national interest in creating and maintaining an effective merchant marine to deal with increased commercial activities relating to trade in territorial waters requires a reconsideration of the Court's position which permits a state to misinterpret a basic tenet of the admiralty

and to take away from a maritime worker's dependents rights that they would ordinarily be entitled to.

Since waterfront workers injured by even shore based equipment used to load and unload ships are covered by a warranty of seaworthiness. *Huff* v. *Matson Navigation Co.* (9th Cir. 1964), 338 F.2d 205, cert. den. 380 U.S. 943; *Spann* v. *Lauritzen* (3rd Cir. 1965), 344 F.2d 204, cert. den. 382 U.S. 1000 . . . . . because the work is held to be in the ship's service, *Seas Shipping Co.* v. *Sieracki* (1964), 328 U.S. 85, 89; *Crumady* v. *The Joachim Hendrik Fisser* (1959), 358 U.S. 423, 427 and *Italia Societa* v. *Oregon Stevedoring Co.* (1964), 376 U.S. 315, 323, then to reach the illogical next step that the warranty only extends in the event of an injury but not in the event of a death is unconscionable.

Certainly this ludicrous position is untenable and as the federal courts do have broad jurisdiction in cases of admiralty and maritime jurisdiction and as the law is designed to correct inequities that occur, then the Court should conclude that a change is necessary.

B. The Tungus v. Skovgaard Decision Has Not Survived.

Time has eroded the *Tungus* case due to that decision's basic fault. In the case of *Goett* v. *Union Carbide Corporation*, (1960) 361 U.S. 340, 80 S. Ct. 357, 4 L.ed 2d 341, where the deceased fell from a river barge and drowned and an action was brought in admiralty against deceased's employer and owner of barge to recover for the death. It was determined that since the Court of Appeals did not specifically state whether it relied upon the West Virginia Wrongful Death Statute or the general maritime's concepts of negligence and unseaworthiness, that the case should be remanded to the Court of Appeals for determination.

The foregoing decision clearly reflects the strain of the attempt to comply with the *Tungus* decision and yet provide sensible ground rules for the decisions concerning the Wrongful Death Statutes of the various states and their possible offensiveness to the Admiralty and Maritime Law.

The issue was also treated in the case of *Hess* v. *United States,* (1960) 361 U.S. 314, 80 S. Ct. 341, L.ed 2d 305, wherein the question to be decided was whether the State Wrongful Death Act and/or the Employers' Liability Law could be applied to a claim for death occurring in navigable waters within the territorial district of a state. The Court held that The Employer's Liability Act could be applied and in support stated, that although the question whether a State Wrongful Death Act might contain provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce, the Oregon statute did not present such a problem. In fact, the particular statute contained provisions more consonant with traditional principles of admiralty than the State's Wrongful Death Act.

The obvious effect of this decision is that the Admiralty and Maritime Law must keep a watchful eye on the various states so that no infringements may be made on this basic concept.

An interesting confirming opinion presented in the *Hess case,* supra exposing this problem was set forth at p. 347:

> "The Chief Justice, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennan join the opinion of the Court, but solely under compulsion of the Court's ruling in The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, L. ed. 2d 524. They believe that as long as the view of the law represented by that ruling prevails in the Court, it should be applied evenhandedly, despite the contrary views of some of those originally joining it that the state law is the measure of recovery when it helps the defendant, as in Tungus, and is not

> the measure of recovery when it militates against the defendant as it does here. However, they note their continued disagreement with the ruling in The Tungus, and reserve their position as to whether it should be overruled, particularly in the light of the controversy application of it has engendered among its original subscribers."

Since the *Hess* case permitted a selection between two state statutes, it is obvious that the decision has at least extended *Tungus* so that there is no requirement that only the State Wrongful Death Statute shall be applied. The underlying motivation was that "the particular statute contained provisions more consonant with traditional principles of admiralty than the State's Wrongful Death Act."

Our legislative history as well as logic dictates that neither Congress by statute nor the Judiciary by precedent would intentionally eliminate or restrict the then-existing remedies based upon unseaworthiness. Therefore, we are left with the conclusion that the present anomalous state of the law was not anticipated. The shipowner is not really affected by allowing recovery for death occurring within the territorial waters of a state, since he has the constant burden of maintaining a seaworthy vessel. Thus, to permit the continuation of this legal anomaly is totally without merit.

As Judge Goldberg so cogently stated in his dissent in the *Gillespie* v. *United States Steel Corporation* (1964) 379 U.S. 148, 166; 85 S. Ct. 308, 318:

> "'STARE DECISIS does not mean blind adherence to irrational doctrine. The very point of STARE DECISIS is to produce a sense of security in the working of the legal system by requiring the satisfaction of reasonable expectations. I should think that by allow-

ing a remedy where one is needed, by eliminating differences not based on reason, while still leaving the underlying scheme of duties unchanged, this sense of security will not be weakened but strengthened."

C. The Present Complicated Status Of The Law Began With *The Harrisburg* And Should End With *Moragne*.

The phrase "They are products of their environment" has been applied in description of the vilest criminal to the most expert artist in an endeavor to explain the subject's motivation. The same principle is applicable to an explanation of some of our jurisprudence.

In the year 1886, the case of *The Harrisburg*, 119 U.S. 199, was decided holding that there was no action for death in the absence of statute under the general maritime law and also that the state Statute of Limitations of one year was appropriate barring the action.

It is of crucial importance to comprehend that the sociological drive of that era was to retain the state's separate sovereignty because of the underlying concern that the federal government would usurp the state's powers. However, analysis of that concept does not stand the test of scrutiny by today's standards.

The more modern jurisprudence dictates that the federal government must concern itself with the decisions of the separate states, in order to provide a fair and cohesive form of legal precedents. The decisions in the field of civil rights for example, clearly depict the necessity for the overseeing of our legal concepts by the federal judiciary.

As was stated in a very recent decision abrogating governmental immunity, *Perkins* v. *State of Indiana*, (1969) 251 N.E.2d 30

> "The argument that the legislature — not the Court — is the one to make the change, is answered by the fact that the principle was created by the courts as part of the common law, and if error exists or if the principle has become antiquated, it is the duty of the Court to change it."

The judicial process has sail as well as anchor. If judges have slammed the courtroom door without legislative aid, they can likewise re-open them without legislative help. When judges review past mistakes without fear and excise them without reluctance they become a positive educational force for the country in reinterpreting those moral values wrapped in the language of legal commands. In this greatest of functions judges hold up to all students of the law the "habitual vision of greatness."

There is no question that our Admiralty Jurisprudence is what the judge sitting in Admiralty wants it to be. The Admiralty judges have patterned their decisions based upon equity and with absolute acuity keyed to the changing needs and desires of the community.

In the case of *Kossick* v. *United Fruit Co.*, (1961) 365 U.S. 731, 81 S. Ct. 886; wherein a shipowner agreed to hold itself responsible for inadequate or improper treatment at a Public Health Service Hospital and the seaman alleged that he had been injured by said treatment. The shipowner then countered by saying that the state Statute of Frauds barred this claim. The decision not only concluded that it was a maritime contract, but that the state Statute of Frauds was not applicable thereby demonstrating that a state act restricting the Maritime or Admiralty Law must fail.

In *Mahnich* v. *Southern S.S. Co.* (1944) 321 U.S. 96, 64 S. Ct. 455; the Court sitting in Admiralty held that, notwithstanding the fact that there was good rope aboard, the fact that the mate selected rope to be used for a staging

and which was not suitable thereby causing injury rendered the vessel unseaworthy.

Here again, because of the Court's position enunciated time and again that the seamen are deemed to be Wards of the Admiralty and because of the rigorous discipline of the sea, as well as the hazards and conditions which he must accept, molded and extended the law to provide protection for the seaman.

A far-reaching decision wherein an Admiralty Court recognizing that the dominant intent of Congress in enactment of the Longshoremen's and Harbor Workers' Compensation Act was to help longshoremen, construed the said Act as not to restrict the longshoreman from his remedy in an action against the shipowner based upon unseaworthiness notwithstanding that coverage existed under the Longshoremen and Harbor Workers' Act. *Reed* v. *Steamship Yaka*, (1963) 373 U.S. 410, 83 S. Ct. 1349.

If the Admiralty and Maritime Law is capable of fashioning a new remedy when one is needed, strike down state doctrines offensive to the Admiralty and Maritime Law when necessary, and provide fair and equitable treatment to all connected with maritime activity because of the inequality of bargaining power, then how can the ancient and outlived doctrine of *The Harrisburg* be permitted to cloud and taint the constant quest for enlightenment. The answer is, obviously, it cannot continue and should be graciously put to rest forever after having served for many years.

Since law should be active and dynamic and not a frozen mold of ancient ideas, it must change with the times, the needs and as society grows, so that in the broader views of the problem decisions must be made anew in trying to determine whether the reason for the rule continues to survive.

As Oliver Wendell Holmes in a discussion, of early

forms of liability in his "Common Law", pp. 36, 37, 1881 Ed. makes this statement with reference to its development:

> "... The truth is that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."

Conclusion

For the foregoing reasons, The American Trial Lawyers Association respectfully asks this Court to reject the archaic concepts heretofore expounded due to pressures of that era, and to adopt a much more modern and realistic approach to create uniformity in the Admiralty and Maritime Law.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this motion and brief have been furnished by mail to John W. Boult, Esquire, of Fowler, White, Collins, Gillen, Humkey & Trenam, Post Office Box 1438, Tampa, Florida 33601, Attorneys for Appellee, States Marine Lines, Inc., and to David C.G. Kerr, Esquire, of Macfarlane, Ferguson, Allison, Kelly & Himes, Post Office Box 1531, Tampa, Florida, 33601, Attorneys for Appellee, Gulf Florida Terminal Company, and C.J. Hardee, Jr., Esquire of Hardee, Ott & Hamilton, 101 East Kennedy Boulevard, Tampa Florida, 33602 Attorneys for Appellant.

Said service was made on December 23, 1969.

DAVID B. KAPLAN